

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC: [REDACTED]: [REDACTED]: [REDACTED]: TL-N-5533-00  
[REDACTED]

date:

to: Chief, Examination Division, [REDACTED] District  
Attention: [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED], Group Manager, Employment Tax  
[REDACTED], Employment Tax Specialist  
[REDACTED]

from: [REDACTED], Associate Area Counsel, LMSB  
[REDACTED], Attorney [REDACTED]  
[REDACTED], Attorney [REDACTED]

subject: **Taxpayers:** [REDACTED] and [REDACTED]  
[REDACTED]

**Issue: Securing Forms SS-10**

THIS ADVICE CONSTITUTES RETURN INFORMATION SUBJECT TO I.R.C. § 6103. THIS ADVICE CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND IF PREPARED IN CONTEMPLATION OF LITIGATION, SUBJECT TO THE ATTORNEY WORK PRODUCT PRIVILEGE. ACCORDINGLY, THE EXAMINATION OR APPEALS RECIPIENT OF THIS DOCUMENT MAY PROVIDE IT ONLY TO THOSE PERSONS WHOSE OFFICIAL TAX ADMINISTRATION DUTIES WITH RESPECT TO THIS CASE REQUIRE SUCH DISCLOSURE. IN NO EVENT MAY THIS DOCUMENT BE PROVIDED TO EXAMINATION, APPEALS, OR OTHER PERSONS BEYOND THOSE SPECIFICALLY INDICATED IN THIS STATEMENT. THIS ADVICE MAY NOT BE DISCLOSED TO TAXPAYERS OR THEIR REPRESENTATIVES.

THIS ADVICE IS NOT BINDING ON EXAMINATION OR APPEALS AND IS NOT A FINAL CASE DETERMINATION. SUCH ADVICE IS ADVISORY AND DOES NOT RESOLVE SERVICE POSITION ON AN ISSUE OR PROVIDE THE BASIS FOR CLOSING A CASE. THE DETERMINATION OF THE SERVICE IN THE CASE IS TO BE MADE THROUGH THE EXERCISE OF THE INDEPENDENT JUDGMENT OF THE OFFICE WITH JURISDICTION OVER THE CASE.

Pursuant to your request, we have reviewed the Forms SS-10, Consent to Extend the Time to Assess Employment Taxes, attached hereto as Exhibits A and B (the "Proposed Consents"), that you propose to issue to [REDACTED] (" [REDACTED] ") and [REDACTED] (" [REDACTED] "), respectively.

In addition, we have also reviewed the Forms SS-10 currently in effect for [REDACTED] and [REDACTED], attached hereto as Exhibits C and D respectively (the "Current Consents"), extending the statute of limitations for [REDACTED] and [REDACTED] to [REDACTED].

### ISSUES

1. Whether the taxpayers' names were properly captioned on the Current Consents. If not, whether the equitable remedy of reformation could be applied to cure the defect.
2. Whether the Current Consents are binding on the subsidiaries identified on the riders attached thereto.
3. Whether the Service should issue the Proposed Consents.

### CONCLUSION/RECOMMENDATIONS

1. No. The taxpayers' names were not properly captioned on the Current Consents, because the captions failed to take into account the taxpayers' merger into another corporation. However, we believe that the equitable remedy of reformation could be applied to correct the miscaptions.
2. Yes. Where a Form SS-10 applies to both the parent corporation and its subsidiaries identified on a rider, Rev. Proc. 72-38, 1972-2 C.B. 813 requires the Form SS-10 to be signed by a duly authorized officer of the parent corporation who is also either a duly authorized officer or an attorney-in-fact for each of the subsidiaries listed on the rider. [REDACTED], who signed the Current Consents, was neither a duly authorized officer or an attorney-in-fact for any of the subsidiaries listed on the respective riders attached to the Current Consents. Nevertheless, we believe that the Current Consents are binding on the subsidiaries based on the legal doctrines of: (1) actual or apparent authority; (2) equitable estoppel; and (3) ratification.

While we believe that the Current Consents are valid with respect to the taxpayers and their subsidiaries, we recommend that you inform the taxpayers of the shortcomings or problems noted herein, including the miscaptions.

3. In lieu of the Proposed Consents, we recommend that you obtain three Forms SS-10, captioned as follows:

(1) Regarding [REDACTED] for tax years [REDACTED] through [REDACTED]:

[REDACTED] (EIN XX)  
(formerly known as [REDACTED])

[REDACTED]<sup>1</sup>) successor in interest to [REDACTED]  
[REDACTED] (EIN: [REDACTED]).

(2) Regarding [REDACTED] for tax years [REDACTED] through [REDACTED]:

[REDACTED] (EIN XX)  
(formerly known as [REDACTED])  
[REDACTED]<sup>2</sup>) successor in interest to [REDACTED]  
[REDACTED] (formerly known as [REDACTED])  
[REDACTED] (EIN: [REDACTED]).

(3) For tax year [REDACTED]:

[REDACTED] (EIN [REDACTED]),  
formerly known as [REDACTED].

For each Form SS-10, the number of subsidiaries named on the rider must also be inserted in the space provided on the Form SS-10 for the name of the taxpayer.<sup>3</sup>

Each Form SS-10 must be signed by a duly authorized officer of the parent corporation who is also a duly authorized officer of each of the subsidiaries, or has been specifically authorized to execute a consent by powers of attorney executed by each of the subsidiaries.

Please ensure that the riders include each and every subsidiary to which the consents should apply.<sup>4</sup>

Each rider should contain a supplemental agreement, clearly identify the parent and the specific subsidiaries by showing their names, addresses, and identification numbers, and reflect

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<sup>1</sup> The LEXIS database, attached hereto as Exhibit E, indicates that [REDACTED] was formerly known as [REDACTED]. If this is true, you can modify the parenthetical in the caption to read: (formerly known as [REDACTED] and [REDACTED]).

<sup>2</sup> See supra note 1.

<sup>3</sup> Please delete the asterisk and the related paragraph regarding consolidated tax liability.

<sup>4</sup> We do not opine as to whether the riders attached to the Proposed Consents include each and every subsidiary.

the particular taxable years or periods, as well as the applicable excise or employment taxes, of each subsidiary with respect to which the form is applicable.

In addition, the Service should attach a statement to the relevant employment tax return of each subsidiary identified on the riders indicating that a consent executed on behalf of the subsidiary has been secured and associated with the return of the parent. The statement should also show the name, address, and identification number of the parent corporation, the office in which the applicable tax return of the parent corporation was filed and the period of the extension agreed to in the consent. In the alternative, a copy of the executed Form SS-10 and the rider may be attached to the employment returns of the subsidiaries.

Finally, please double-check all entity names, EINs, addresses, and taxable years, and please ensure that the Forms SS-10 and the associated riders satisfy the requirements of Rev. Proc. 72-38.

#### FACTS<sup>5</sup>

[REDACTED] ("old-[REDACTED]"; EIN [REDACTED]) was a common parent of a consolidated group. [REDACTED] ("[REDACTED]") was a common parent of another consolidated group.

On [REDACTED], [REDACTED] ("old-[REDACTED]") was merged into [REDACTED] (a wholly-owned subsidiary of [REDACTED]), which immediately changed its name to [REDACTED] ("new-[REDACTED]").

During [REDACTED], old-[REDACTED] formed 3 corporations: (1) [REDACTED] (EIN [REDACTED]); (2) [REDACTED], a wholly-owned subsidiary of [REDACTED]; and (3) [REDACTED], also a wholly-owned subsidiary of [REDACTED].

On [REDACTED], two reorganizations took place: (1) [REDACTED] was merged into old-[REDACTED]; and (2) [REDACTED] was merged into [REDACTED] such that old-[REDACTED] and [REDACTED]

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<sup>5</sup> The facts stated herein are based on the documents and information you provided. We have not undertaken any independent investigation of the facts of this case. If the facts stated herein are incorrect or incomplete in any material respect, you should not rely on the opinions set forth in this memorandum, and should contact our office immediately.

became wholly-owned subsidiaries of [REDACTED].

On or before [REDACTED], [REDACTED] changed its name to [REDACTED] ("new- [REDACTED]"; same EIN as [REDACTED]) and old- [REDACTED] changed its name to [REDACTED].

On [REDACTED], [REDACTED], a wholly-owned subsidiary of new- [REDACTED], changed its name to [REDACTED] (" [REDACTED]").

On [REDACTED], new- [REDACTED] merged into [REDACTED].

Effective [REDACTED], [REDACTED] was merged downstream into [REDACTED], and [REDACTED] became a wholly-owned first tier holding company of new- [REDACTED]. Also, effective [REDACTED], [REDACTED] was merged into [REDACTED]. Attached hereto as Exhibits F and G are the merger agreements for [REDACTED] and [REDACTED], respectively. In addition, attached hereto as Exhibit H are various organizational charts.

In [REDACTED], the Service secured the Current Consents, captioned as "[REDACTED]," (referencing EIN [REDACTED]) for tax years [REDACTED] through [REDACTED], and "[REDACTED]" for tax years [REDACTED] through [REDACTED]. The Current Consents were signed by [REDACTED], the Vice-President of Tax, for [REDACTED] only; [REDACTED] was neither an officer nor an attorney-in-fact for any of the subsidiaries listed on the riders attached to the Current Consents.

#### DISCUSSION

Employers which are required to pay federal unemployment taxes must file annually Form 940, Employer's Annual Federal Unemployment Tax Return, see Treas. Reg. § 31.6071(a)-1(c), and employers subject to Federal Insurance Contributions Act or income tax withholding, or both, are generally required to file quarterly a Form 941, Employer's Quarterly Federal Tax Return, see Treas. Reg. § 31.6011(a)-4(a).

Generally, the Service must make an assessment of tax within three years after the return is filed, see I.R.C. § 6501(a); however, before the period for making an assessment expires, the Service and the taxpayer may consent in writing to extend the period for making an assessment, see I.R.C. § 6501(c)(4).

#### I. Which Corporation Should Sign the Forms SS-10

When state law so provides, the successor in interest is

primarily liable for the debts and obligations of the absorbed corporation.<sup>6</sup> Phillips v. Lyman H. Howe Films Co., 33 F.2d 891, 892 (3d Cir. 1929).

The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931). When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "surviving corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972).

The merger agreements, by which [REDACTED] (i.e. old-[REDACTED]) and [REDACTED] were merged into [REDACTED], an Indiana corporation, provided that the agreements were to be governed by the laws of the State of Indiana, and that [REDACTED], as the surviving corporation, would assume all liabilities and obligations of the merged corporations as required by Indiana law.

IND. CODE ANN. § 23-1-40-6(a)(3) (Burns 2000) provides that "[w]hen a merger takes effect . . . [t]he surviving corporation has all liabilities of each corporation party to the merger . . . ."

#### A. Proposed Consents

Here, because Indiana law so provides, [REDACTED], as of [REDACTED], became the surviving corporation and primarily liable for the employment taxes of [REDACTED] and [REDACTED] (i.e. old-[REDACTED]). Consequently, it is our opinion that the Service should set forth the taxpayer's name on respective Form SS-10 as follows:

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<sup>6</sup> While it can also be argued that the surviving corporation in a statutory merger is liable for the debts of the merged corporation as a transferee, see Treas. Reg. § 301.6901-1(b), as a general practice, in merger cases where state law imposes primary liability on the surviving corporation, the Service asserts primary liability only and not transferee liability against the surviving corporation due to the Tax Court's rejection of transferee liability in such cases. G.C.M. 34,970; see also Missile Sys. Corp. v. Commissioner, T.C. Memo 1964-212.

1. For [REDACTED]--[REDACTED] through [REDACTED], inclusive:

[REDACTED] (EIN XX)  
 (formerly known as [REDACTED]  
 [REDACTED]<sup>7</sup>) successor in interest to [REDACTED]  
 [REDACTED] (EIN: [REDACTED]).

2. For old-[REDACTED]--[REDACTED] through [REDACTED], inclusive:

[REDACTED] (EIN XX)  
 (formerly known as [REDACTED]  
 [REDACTED]<sup>8</sup>) successor in interest to [REDACTED]  
 [REDACTED] (formerly known as [REDACTED]  
 [REDACTED]) (EIN: [REDACTED]).

3. For tax year [REDACTED]

[REDACTED] (EIN [REDACTED]),  
 formerly known as [REDACTED].

B. Current Consents--Equitable Remedy of Reformation

When the Current Consents were executed in [REDACTED], both [REDACTED] and old-[REDACTED] had been merged into [REDACTED] and no longer existed. Therefore, the Current Consents were improperly captioned. The proper name for the consent for [REDACTED] would have been [REDACTED] (formerly known as [REDACTED]), successor-in-interest to [REDACTED], and the proper caption for old-[REDACTED] would have been [REDACTED] (formerly known as [REDACTED]), successor-in-interest to [REDACTED] (formerly known as [REDACTED]). The issue is whether the Current Consents are valid despite the miscaptioning of the taxpayers' names.

A consent to extend the period of limitations is essentially a unilateral waiver of a defense by the taxpayer and is not a contract. Stange v. United States, 282 U.S. 270 (1931); Kelley v. Commissioner, 45 F.3d 348, 350 n.4 (9th Cir. 1995); Piarulle V. Commissioner, 80 T.C. 1035, 1042 (1983), acq., 1984-2 C.B. 2. Contract principles are significant, however, because I.R.C. § 6501(c)(4) requires that the parties reach a written agreement as to the extension. Piarulle, 80 T.C. at 1042. The term "agreement" means a manifestation of mutual assent. Id. It is the objective manifestation of mutual assent as evidenced by the

<sup>7</sup> See supra note 1.

<sup>8</sup> See supra note 1.

parties' overt acts that determines whether the parties have made an agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988).

Generally, a consent that is clear on its face and that contains no ambiguous language is the objective manifestation of mutual assent and will stand by itself. That is, the Court will not consider extrinsic evidence of the parties' intent when interpreting the agreement reached by the parties.

This general rule, however, does not apply where the parties have made a "mutual mistake" in drafting a consent (also referred to as a "scrivener's mistake"). See Woods v. Commissioner, 92 T.C. 776, 782-784 (1989). According to Woods, "[a] mutual mistake exists 'where there has been a meeting of the minds of the parties and an agreement actually entered into but the agreement in its written form does not express what was really intended by the parties.'" 92 T.C. at 782 (quoting Black's Law Dictionary 920 (5th ed. 1979)). Under such circumstances, the Court will reform the consent so that it conforms to the agreement of the parties. State Police Ass'n v. Commissioner, 125 F.3d 1, 5 n.2 (1st Cir. 1997); Woods, 92 T.C. at 782-83; Restatement (Second) of Contracts § 155 (1981). The equitable remedy of reformation applies to drafting errors, not to mutual mistakes as to underlying facts.

In this case, we believe there is sufficient extrinsic evidence show that the taxpayer and the Service intended to extend the period of limitations for [REDACTED], as successor in interest to [REDACTED] and old-[REDACTED].

First, [REDACTED] who executed the Current Consents was an officer of [REDACTED], the successor corporation to [REDACTED] and old-[REDACTED].

Second, when the Current Consents were executed, all of the parties knew that both [REDACTED] and old-[REDACTED] had been merged into [REDACTED] and no longer existed. There was no misunderstanding or mistake as to this fact.

Third, there was a meeting of the minds among the parties as to the entities to which the Current Consents relate. The Current Consents reference the EINs and former street addresses of old-[REDACTED] and [REDACTED]. Thus, the mistake did not stem from any misunderstanding or disagreement over the underlying facts, but merely in failing to account for the taxpayers' mergers into [REDACTED] in drafting the Current Consents.

## II. Who Should Sign the Forms SS-10

Both the Form SS-10 and the rider must be executed on behalf of the parent corporation and all the subsidiaries named on the rider by a duly authorized officer of the parent corporation who (1) is also a duly authorized officer of each of the subsidiaries, or (2) has been specifically authorized to execute a consent by powers of attorney executed by each of the subsidiaries.

An officer duly authorized to sign the consent includes the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual signed the return is prima facie evidence that such individual is authorized to sign the return on behalf of the corporation. I.R.C. § 6062; Rev. Rul. 83-41, 1983-1 C.B. 349.

A. Proposed Consents

As required by Rev. Proc. 72-38, please ensure that the consents are signed by an individual who is not only a duly authorized officer of the parent corporation but also either a duly authorized officer of each of the subsidiaries or has been specifically authorized to execute a consent by powers of attorney executed by each of the subsidiaries.

B. Current Consents--Do They Bind the Subsidiaries?

[REDACTED] who signed the Current Consents was neither an officer nor an attorney-in-fact for any of the subsidiaries identified on the riders attached to the Current Consents. Thus, the issue is whether the Current Consents are binding on the subsidiaries.

(i) Lack of Forms 2848 is not Fatal

According to Treas. Reg. § 601.504(a)(3), a representative cannot execute a consent to extend the statutory period for assessment of tax without a power of attorney. However, the fact that the Service did not secure Forms 2848, "Power of Attorney and Declaration of Representative," from each of the subsidiaries listed on the riders is not fatal. As the Tax Court stated in Lyon v. Commissioner, T.C. Memo. 1994-351, Treas. Reg. § 601.502<sup>9</sup> (predecessor to Treas. Reg. § 601.504(a)(3)) is part

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<sup>9</sup> Treas. Reg. § 601.502 differs from the current Treas. Reg. § 601.504(a)(3) in that the former regulation allowed the Service to substitute a requirement other than a power of attorney form as evidence of authority of the taxpayer's

of the Service's Statement of Procedural Rules. As such, the Tax Court noted that these rules are for the internal governance of the Service, do not have the force and effect of law, and are not binding on the agency issuing them.

Furthermore, the Service may waive its own administrative rules. Because they were intended for the "protection and administrative convenience of [the I.R.S.], . . . [the taxpayer] cannot claim that [the I.R.S.'s] failure to abide by [its] own rules has prejudiced him . . . ." Ryan v. Commissioner, T.C. Memo. 1991-49. The court reasoned that:

the conditions provided for in the statute and interpreted by the regulations are directory in nature rather than mandatory. In our view, the acceptance by respondent of a consent extending the [period of limitations] which had been executed by a taxpayer's agent without express authority (but within the general scope of his powers) merely constitutes a waiver by the respondent of one of his own requirements designed generally to improve administrative procedures. There is nothing in the law or the regulation calculated to indicate that respondent is to be placed in a straitjacket which, by iron rule, is to remove all flexibility in administration. We hold that the provisions of section 276(b) [the predecessor of section 6501(c)(4)], supra, and the interpretative regulations are directory or advisory, not mandatory.

Id., (quoting Estate of Maceo v. Commissioner, T.C. Memo. 1964-46).

In this case, the Current Consents were signed by the Service's group manager, thus indicating that the Service has waived the need for evidence of the Forms 2848. Without the executed Forms 2848, the question then is whether the Current Consents are binding on the subsidiaries under other legal theories, such as: (1) authority; (2) equitable estoppel; and (3) ratification.

(ii) Authority

According to Restatement (Second) of Agency § 26 (1958), actual authority may be impliedly conferred by custom or usage, by conduct of the principal indicating his intention to confer it, or by otherwise causing the agent to believe that he

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representative.

possesses it. See Billops v. Magness Constr. Co., 391 A.2d 196, 197 (D. Del. 1978). Apparent authority arises when a principal creates, by his words or conduct, the reasonable impression in a third party that the agent had the authority to perform the act on his behalf. See Evans v. Skinner, 742 F. Supp. 30, 33 (D.D.C. 1990); Restatement (Second) of Agency § 8 (1958). The basic difference between actual and apparent authority is that in the former, the expression of authority is made directly to the agent, whereas in the latter, the expression is made to the third person with whom the agent deals.

In this case, [REDACTED] signed the Current Consents as an agent for the subsidiaries, providing evidence of both actual and apparent authority.

(iii) Equitable Estoppel

In addition, it is possible to argue that the subsidiaries would be equitably estopped from denying the validity of the Current Consents. Generally speaking, equitable estoppel precludes a party from denying that party's own acts or representations which induced another to act to the latter's detriment. See Union Texas Int'l Corp. v. Commissioner, 110 T.C. 321 (1998). The estoppel is invoked whenever the principal has intentionally or negligently caused or allowed a third person to believe that the agent has authority to do that which in fact he is not authorized to do, and the third person detrimentally relies thereon so that it would be unjust to allow the principal to deny the agent's authority. Id.; Dukes v. United States Health Care Sys., 848 F. Supp. 39, 41 n.3 (E.D. Penn. 1994).

The doctrine of equitable estoppel is based on the grounds of public policy, fair dealing, good faith, and justice. The elements of equitable estoppel are generally as follows: (1) There must be a false representation or wrongful misleading silence by the party against whom the estoppel is claimed; (2) The error must originate in a statement of fact, not in opinion or a statement of law; (3) The party claiming the benefits of the estoppel must have actually and reasonably relied on the acts or statement of the party against whom the estoppel is claimed, and as a consequence of that reliance must be adversely affected by the acts or statements of the one against whom an estoppel is claimed; and (4) The party claiming the benefits of estoppel must not know the true facts. Union Texas Int'l Corp., 110 T.C. at 327.

For example, where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the

particular business is justified in assuming that such agent has authority to perform a particular act and deals with the agent upon that assumption, the principal is estopped as against such third person from denying the agent's authority. See Pegg v. General Motors Corp., 1992 U.S. Dist. LEXIS 20490 (D.C. Kan. 1992); 3 Am. Jur. 2d Agency §§79, 81 (1999). Estoppel may come about due to a misrepresentation or due to a wrongful, misleading silence. Fredericks v. Commissioner, 126 F.3d 433, 438 (3d Cir. 1997).

In this case, the subsidiaries were most likely aware that [REDACTED] executed the Current Consents on their behalf and should have informed the Service if the subsidiaries had not, in fact, authorized [REDACTED] to sign the Current Consents on their behalf. Due to their silence, the Service had no reason to doubt [REDACTED]'s authority to execute the Current Consents on behalf of the subsidiaries, and did not secure any other Form SS-10 to extend the statute with respect to the subsidiaries. The Service was justified in believing that [REDACTED] had authority to bind the subsidiaries, and the subsidiaries should be estopped from denying the validity of the Current Consents. Otherwise, the subsidiaries, through their silence, would have been successful in misleading the Service to its detriment.

(iv) Ratification

An agreement which is defective at the time of its execution may be ratified by the taxpayer. In Lyon, supra, by oversight and error, the taxpayer's attorney was not granted the power of attorney with respect to taxable year 1985; however, the attorney signed an agreement extending the statute of limitations with respect to the 1985 year. Upon learning of this, the taxpayer disavowed the agreement. The Tax Court held that by his silence, the taxpayer ratified the agreement, and the issue of silence arose "at the time the petitioner received a copy of the [agreement]," not at the time when he first became aware that no power of attorney form was executed for the 1985 year. Because the taxpayer remained silent when he first learned of the agreement, he ratified the agreement.

Similarly, the subsidiaries, who most likely are aware of the riders attached to the Current Consents, have, through their silence, ratified the Current Consents as applied to them. If they had not authorized [REDACTED] to act on their behalf, they should have disavowed [REDACTED]'s action in signing the Current Consents. The court places the ultimate responsibility on the taxpayer to disavow any unauthorized acts:

Petitioner's inaction also operates as a ratification

since it was incumbent upon him to repudiate [the accountant's] action as soon as he learned of it, if in fact petitioner had not authorized it in the first place. Even if petitioner was unaware of the status of his case or the consequences of his forwarding to [the accountant] the documents which he received from respondent, this would not absolve him of the responsibility for the acts of [the accountant]. The ultimate responsibility for petitioner's tax matters rests with petitioner, who had the duty to disaffirm any unauthorized acts by [the accountant] . . . .

Ryan v. Commissioner, T.C. Memo. 1991-49; accord Kraasch v. Commissioner, 70 T.C. 623 (1978).

In the case at hand, assuming that the subsidiaries were aware of the riders attached to the Current Consents and that [REDACTED] signed the Current Consents on their behalf, they have failed to disaffirm [REDACTED]'s act, and the Current Consents are binding on the subsidiaries.

### III. The Riders

Rev. Proc. 72-38 sets forth the conditions under which the Service will accept a single consent to extend the statute of limitations for a parent corporation and its subsidiaries. The revenue procedure requires a rider be affixed to the consent. Attached as Exhibit I is an example of a rider to be attached to a Form SS-10.

For each rider, the name of the parent corporation and the number of subsidiary corporations named on the attached rider should be inserted in the space provided for the name of the taxpayer on the Form SS-10. Rev. Proc. 72-38.

Each rider should contain a supplemental agreement, clearly identify the parent and the specific subsidiaries by showing their names, addresses, and identification numbers, and reflect the particular taxable years or periods, as well as the applicable excise or employment taxes, of each subsidiary with respect to which the form is applicable. Id.

In the event two or more officers of the parent corporation are signing for the various subsidiaries, the rider attached to the consent should be arranged to show the names of the subsidiaries for which each officer or attorney-in-fact is signing. Id.

In addition, the Service should attach a statement to the

relevant employment tax return of each of the subsidiary corporations indicating that a consent executed on behalf of the subsidiary has been secured and associated with the return of the parent. The statement should also show the name, address, and identification number of the parent corporation, the office in which the applicable tax return of the parent corporation was filed and the period of the extension agreed to in the consent. Rev. Proc. 72-38. In the alternative, a copy of the executed Form SS-10 and the rider may be attached to the employment returns of the subsidiaries.

#### A. Proposed Riders

The proposed riders are incomplete. The Service should add the number of subsidiary corporations in the space provided for the name of the taxpayer on Form SS-10. In addition, the Service should include the address of each subsidiary and, in the event that two or more officers sign for the various subsidiaries, the name of the officer who is signing for such subsidiary.

Also, please adhere to the requirement of attaching a statement, as described herein, to the employment tax return of each subsidiary listed on the riders. In the alternative, a copy of the executed Form SS-10 and the rider may be attached to the employment returns of the subsidiaries.

#### B. Current Riders

We note that the riders attached to the Current Consents do not conform to the requirements of Rev. Proc. 72-38. Specifically, the riders should have included the address for each subsidiary, and, if applicable, the taxable years for which the period of limitations was being extended for each subsidiary.

We believe that the above shortcomings do not invalidate the riders. The riders clearly identify the subsidiaries by their names and EINs, and there is no ambiguity as to the subsidiaries included on the riders.

#### IV. Notifying the Taxpayers

We noted several problems with the Current Consents, including the improper captioning of the taxpayers' names and the non-conformance with several provisions of Rev. Proc. 72-38.

While we believe that the Current Consents are still valid and that the statute of limitations have not expired, we recommend that you inform the Taxpayers of the shortcomings of the Current Consents discussed herein. Although there are no

legal or professional rules of conduct that require us to inform the taxpayers, as counsel to the Service, "our legal practice and conduct should always be characterized by adherence to the highest standards of professionalism, honesty, and fair play." CCDM 30.4.8.7 (April 15, 1999). Generally, the Service should hold itself to a higher duty to the public and conduct itself in an open and honest manner.

In the instant case, we are relying on various legal doctrines, such as the equitable remedy of reformation, actual and apparent authority, and estoppel, to validate the Current Consents. In particular, the equitable remedy of reformation is based on a mutual mistake in drafting the consents. Thus, it is understood that both parties intended the taxpayer's names to reflect [REDACTED], as a successor to [REDACTED] and old-[REDACTED]. It seems incoherent to take a position where we assert that it was the taxpayers' intent to execute the forms, but at the same time fear alerting the taxpayers in case they may claim that they did not have such an intent. Obviously, the intent of the taxpayer is a matter solely in the "mind" of the taxpayer, and the taxpayer's intent is an issue in this case. Thus, the Service should inform the Taxpayers of the shortcomings discussed herein, along with the reasons we believe that the Current Consents are nevertheless valid.

Our advice has been coordinated with the Office of Chief Counsel. If you have any questions, please contact attorneys [REDACTED] at [REDACTED] or [REDACTED] at [REDACTED].

Exhibits:

- A: Current Consent for old-[REDACTED]
- B: Current Consent for [REDACTED]
- C: Proposed Consent for new-[REDACTED]
- D: Proposed Consent for [REDACTED]
- E: LEXIS printout
- F: Relevant portions of Articles of Merger and Plan of Merger between [REDACTED] and [REDACTED]
- G: Relevant portions of Articles of Merger and Plan of Merger between [REDACTED] and [REDACTED]
- H: Organizational Charts
- I: Rider example